

## CHAPTER 1 - GENERAL INFORMATION

### 1.1 INTRODUCTION TO SECTION 7 CONSULTATION

Section 7 of the Endangered Species Act (Act) provides some of the most valuable and powerful tools to conserve listed species, assist with species' recovery, and help protect critical habitat. It mandates all Federal agencies to determine how to use their existing authorities to further the purposes of the Act to aid in recovering listed species, and to address existing and potential conservation issues.

A review of the legislative history of the Act and its amendments makes it clear the drafters of the legislation were designing a law with the strength to protect species, while at the same time creating a mechanism encouraging a productive dialogue between project proponents and the agencies charged with implementing the Act.

Section 7(a)(1) directs the Secretary (Secretary of the Interior/Secretary of Commerce) to review other programs administered by them and utilize such programs to further the purposes of the Act. It also directs all other Federal agencies to utilize their authorities in furtherance of the purposes of the Act by carrying out programs for the conservation of species listed pursuant to the Act.

This section of the Act makes it clear that all Federal agencies should participate in the conservation and recovery of threatened and endangered species. Under this provision, Federal agencies often enter into partnerships and Memoranda of Understanding with the Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS) for implementing and funding conservation agreements, management plans, and recovery plans developed for listed species. Biologists for the Services should encourage the development of these types of partnerships and planning efforts to develop pro-active approaches to listed species management, rather than reacting when a conflict occurs.

Section 7(a)(2) states that each Federal agency shall, in consultation with the Secretary, insure that any action they authorize, fund, or carry out is not likely to **jeopardize** the continued existence of a listed species or result in the destruction or **adverse modification** of designated critical habitat. In fulfilling these requirements, each agency is to use the best scientific and commercial data available. This section of the Act sets out the consultation process, which is further implemented by regulation (50 CFR §402).

This handbook was developed to aid Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) biologists implementing the section 7 consultation process. Throughout the handbook, the term "Services" will be used to generically refer to both agencies together. However, this is not meant to imply that all actions discussed herein are taken by the Services jointly. If a particular section applies to only one agency, the acronyms FWS or NMFS will be used.

By law, section 7 consultation is a cooperative effort involving affected parties engaged in analyzing effects posed by proposed actions on listed species or critical habitat(s). This handbook demonstrates the latitude available within section 7 to work with applicants and agencies during this analytical process.

The following thoughts are offered as an expression of the philosophy guiding section 7 work.

- o The biology comes first. Know the facts; state the case; and provide supporting documentation. Keep in mind the FWS's ecosystem approach to conservation of endangered and threatened species [59 FR 34273-34274 (July 1, 1994)].
- o Base the determination of **jeopardy/no jeopardy** on a careful analysis of the best available scientific and commercial data. Never determine the conclusion of a biological opinion before completing the analysis of the best available data.
- o Clarity and conciseness are extremely important. They make consultation documents more understandable to everyone. A biological opinion should clearly explain the proposed project, its impacts on the affected species, and the Services' recommendations. It should be written so the general public could trace the path of logic to the biological conclusion and complete enough to withstand the rigors of a legal review.
- o Strong interpersonal skills serve section 7 biologists well. Establishing a positive working relationship with action agencies enhances the Services' ability to do the job successfully. Remember, you are trying to assist the agency in meeting their section 7 responsibilities under the Act.
- o Present a positive image as a representative of your Service.
- o Section 7 consultation is a cooperative process. The Services do not have all the answers. Actively seek the views of the action agency and its designated representatives, and involve them in your opinion preparation, especially in the development of

reasonable and prudent alternatives, reasonable and prudent measures, terms and conditions to minimize the impacts of incidental take, and conservation recommendations.

- o Use all aspects of section 7, especially opportunities for informal consultation where solutions can be worked out prior to the structured process mandated by formal consultation. Be creative, and make the process work to the species' advantage.
- o It is important to be consistent throughout a species' range when implementing section 7. Be flexible but not inconsistent. Study the law, the regulations and this handbook. Know the authorities and be flexible when it is prudent, but always stand firm for maintaining the substantive standards of section 7.
- o Take advantage of professional support within and outside the Services. For example, the FWS Division of Engineering can provide valuable technical review of development proposals. Attorneys in the Regional and field offices of the FWS Solicitor/NMFS General Counsel can offer advice on section 7 regulations and the latitude within which to conduct consultation. Similarly, the Services' law enforcement personnel may be able to answer questions about direct or incidental take.
- o Strive to solve problems locally.
- o An effective section 7 biologist is a good teacher and a good student. Seek every opportunity to teach the section 7 process within and outside the Services in an informative and non-threatening way. Learn all you can about other Services' programs, Federal action agency's mandates and procedures, and State/tribal/private agency's/client's needs and expectations.

## **1.2 AGENCY RESPONSIBILITIES**

### **(A) Lead Regions for Consultation**

#### **Fish and Wildlife Service**

When a proposed action takes place in more than one FWS Region, a lead FWS Region is assigned responsibility for the consultation. Generally, the lead FWS Region is the one in which the greatest impact or the largest number of affected species occur. The Regions

involved agree on the appropriate lead Region to prepare and sign the biological opinion. If agreement cannot be reached, the matter is referred to the FWS Director.

Coordination between the FWS consultation lead Region and the FWS recovery lead Region becomes necessary when a FWS Region consults on a species for which it does not have recovery lead. The level of coordination is mutually agreed to and the lead FWS recovery Region may release other FWS Regions from responsibility for coordinating on **no jeopardy** or **no adverse modification** opinions. The FWS Regional Director signing the biological opinion is responsible for its contents, and has final authority to make any **jeopardy** or other finding. However, any changes the lead Region may make in **jeopardy** or **adverse modification** determinations initially made by other Regions must be coordinated before multi-Region opinions are finalized.

Requests for consultation from agencies addressing geographically broad-based or extensive programs are referred to the FWS's Washington Office Division of Endangered Species. This Division coordinates with the Regions to decide whether to recommend formation of a national team or assign the consultation to a lead FWS Region for coordination with other involved Regions. A national team may report to a designated Regional Director or the Assistant Director for Ecological Services (AES). AES submits a recommendation to the FWS Director for consideration. The Director's decision will be communicated to the involved Regions.

### **National Marine Fisheries Service**

Generally, the NMFS Regions are responsible for conducting consultations on activities occurring within their Region. If the activity occurs in more than one Region or the species covered by the consultation occurs in more than one Region, the Regions mutually decide upon a lead Region. If there is no agreement on a lead Region, then the Assistant Administrator for Fisheries (AA) designates a lead Region. The Endangered Species Division in the Office of Protected Resources (F/PR) conducts programmatic consultations and those with a national scope (e.g. EPA's Multisector general permit for stormwater). Currently, all formal biological opinions, with the exception of those conducted by the Southwest and Northwest Regions for anadromous species, are forwarded to the Headquarters Endangered Species Division for review and final clearance. For activities that the Southwest or Northwest Regional Director (RD) considers controversial, the RD must consult with the Director, Office of Protected Resources (Office Director), and advise the AA before the final action is taken.

## **(B) Signature Authority**

### **Fish and Wildlife Service**

The FWS's responsibility for implementing section 7 consultation and conference procedures generally rests with the Regional Directors. The Assistant Director for Ecological Services is the responsible official if the biological opinion or conference opinion is to be signed in the Washington Office. FWS Regional Directors and the Assistant Director for Ecological Services can delegate responsibility and signature authority on non-jeopardy biological opinions and conference opinions to subordinate line officers. For example, FWS Field Office supervisors have been given signature authority on non-jeopardy biological opinions for intra-Service (internal FWS) consultations (see Appendix E for the Intra-Service Consultation Handbook). However, signatory authority for biological opinions finding **jeopardy** or **adverse modification** has not been delegated below the Regional Director/Assistant Director level.

### **National Marine Fisheries Service**

The NMFS Director, Office of Protected Resources, has signature authority for all formal consultations except where this authority has been delegated to the Regions. In 1995, as a result of an increasing number of consultations concerning listed salmon, the Southwest and Northwest Regional Directors were delegated authority to sign all biological opinions for anadromous species, unless the opinion concerns an activity of the Department of Commerce (e.g., fishery harvests). All opinions concerning a Department of Commerce activity are signed by the Office Director.

The Office Director also signs biological opinions related to issuance of section 10 research permits, section 10 incidental take permits (except for anadromous species) or activities such as issuance of regulations. NMFS Regional Directors have signature authority for most informal consultations. However, the Office Director has signature authority for informal consultations on activities that cross regional boundaries or have national significance.

## **(C) Intra-Service Section 7 Consultation**

### **Fish and Wildlife Service**

Intra-Service consultations and conferences will consider effects of the FWS's actions on listed, proposed and candidate species. Candidate species are treated as if they are proposed for listing for purposes of conducting internal FWS conferencing. Although including

candidate species is not required by law, it is Service policy to consider candidate species when making natural resource decisions. Therefore, candidate species will be considered during internal FWS conferencing. FWS units will consult or confer with the appropriate FWS Ecological Services field office on actions they authorize, fund, or carry out that may affect listed, proposed or candidate species or designated or proposed critical habitat. These actions include refuge operations, public use programs, private lands and federal aid activities, as well as promulgating regulations and issuing permits. A Service office requesting formal consultation provides the data required by the regulations at 50 CFR §402.14(c) and is treated as any other action agency (see Appendix E for a copy of the Intra-Service Consultation Handbook). Formal intra-Service consultation should occur on the proposed issuance of any section 10 permit.

### **National Marine Fisheries Service**

NMFS conducts consultations on all activities that it authorizes, funds or permits that may affect listed species. Conferencing is conducted on proposed species. While NMFS does not consult on candidate species, they are considered when making natural resource decisions. Actions that warrant consultation includes fishery management plans, amendments to plans, permits issued under section 10 of the Act and the Marine Mammal Protection Act (MMPA) for research or incidental taking, and regulations issued under the Act, MMPA and Magnuson Fishery Conservation and Management Act. Biological opinions on these activities as well as other Commerce activities are reviewed and signed by the Director, Office of Protected Species.

### **(D) Information Standards and Sources**

#### **Best available scientific and commercial data**

The Act requires the action agency to provide the best scientific and commercial data available concerning the impact of the proposed project on listed species or designated critical habitat. If relevant data are known to be available to the agency or will be available as the result of ongoing or imminent studies, the Services should request those data and any other analyses required by the regulations at 50 CFR §402.14(c), or suggest that consultation be postponed until those data or analyses are available as outlined in section 4.4(A) of this handbook.

Where significant data gaps exist there are two options: (1) if the action agency concurs, extend the due date of the biological opinion until sufficient information is developed for a more complete analysis; or (2) develop the biological opinion with the available information giving the benefit of the doubt to the species. These alternatives must be discussed with the action agency and the applicant, if any. Based on this discussion, a decision regarding the preparation of the biological opinion should be made and documented in the administrative record of that opinion. This subsequent analysis may have minor or major consequences (worst case scenario) depending on the significance of the missing data to the effects determination. The action agency also should be advised that if and when additional data become available, reinitiation of consultation may be required.

If the action agency, or the applicant, insists consultation be completed without the data or analyses requested, the biological opinion or informal consultation letter should document that certain analyses or data were not provided and why that information would have been helpful in improving the data base for the consultation. In formal consultation, this statement usually appears in the "effects of the action" section. The Services are then expected to provide the benefit of the doubt to the species concerned with respect to such gaps in the information base (H.R. Conf. Rep. No. 697, 96th Cong., 2nd Sess. 12 (1979)). This subsequent analysis may have minor or major consequences (worst case scenario) depending on the significance of the missing data to the effects determination. The action agency also should be advised that if and when further data become available, the need for reinitiation of consultation may be triggered.

Section 7 biologists should seek out available information from credible sources such as listing packages, recovery plans, active recovery teams, species experts, State/tribal wildlife and plant experts, universities, peer-reviewed journals and State Heritage programs. Prior consultations on the species also can provide information on baseline and cumulative effects on the species and its habitat, and should provide the species status and environmental baseline data upon which subsequent consultations are based.

An overriding factor in carrying out consultations should always be the use of the best available scientific and commercial data to make findings regarding the status of a listed species, the effects of a proposed action on the species or critical habitat, and the determination of **jeopardy/no jeopardy** to listed species or destruction or **adverse modification/no destruction** or **adverse modification** to designated critical habitats.

The Services have jointly published a policy on Information Standards Under the Endangered Species Act [59 FR 34271 (July 1, 1994)] (see copy in Appendix A). This policy calls for review of all scientific and other information used to prepare biological opinions, incidental take statements, and biological assessments, to ensure that any information used by the

Services to implement the Act is reliable, credible, and represents the best scientific and commercial data available.

### **Writing and bibliographic style**

- o In section 7 consultation documents, keep the first letter of the word "section" lower cased, except when it begins a sentence.
- o Write and edit consultation documents according to:
  - (1) the Council of Biology Editors, Inc. (CBE) Style Manual, 6th edition, (1994), which outlines prose style for scientific writing;
  - (2) the Department of the Interior's rules of plain English as found in:
    - (a) "Readable Regulations: Eleven Models" for Department of the Interior bureaus written by The Murawski Group, Washington DC (1995)
    - (b) "How to Write Regulations and Other Legal Documents in Clear English" by the American Institute for Research, Document Design Center, Washington, DC (1991)
    - (c) "Plain English, a Better Way to Write Our Rules", memo from FWS Assistant Director for Ecological Services to Assistant Regional Directors (June 12, 1996)
- o Letters and memoranda on non-technical issues should be edited according to the conventions established by the Government Printing Office Style Manual.
- o Citations included in text should comply with the CBE Style Manual. Bibliographic references should use the following formats:
  - 1. Single author book.

Tobin, R. 1990. The expendable future: U.S. politics and the protection of biological diversity. Duke University Press; Durham, North Carolina.
  - 2. Multiple author book.



Pickett, S.T.A. and P.S. White. 1985. The ecology of natural disturbance and patch dynamics. Academic Press, Inc.; New York, New York.

3. Scientific papers (spell out the entire name of the journal).

Ahlgren, I.F. and C.E. Ahlgren. 1960. Ecological effects of forest fires. Botanical Review 46:304-310.

4. Unpublished reports (biological assessments, status surveys, section 6 reports, etc.). Cite the document as unpublished. Also include the author's name and the group it was prepared for, as well as their location.

Helms and Associates. 1992. Results of a diving mussel survey conducted at the Pattison Brothers, Inc. and Ag Products Co. facilities near Clayton, Iowa. Unpublished report prepared for Pattison Brothers, Inc.; Clayton, Iowa.

5. Personal communication. Include title, company, office, city and state.

Campbell, T. 1992. Personal communication. Biologist. Environmental Project Office, Naval Air Weapons Station. China Lake, California.

6. Personal observation. Include title, company, office, city and state.

Bransfield, R. 1987. Personal observation. Fish and Wildlife Biologist. Ecological Services Ventura Field Office, U.S. Fish and Wildlife Service, Ventura, California.

## **(E) Early Alerts**

### **Fish and Wildlife Service**

The FWS Regional Directors provide the FWS Washington Office with an early alert to inform the Director of both draft and final biological opinions, preliminary biological opinions (early consultation), and conference opinions of regional or national significance likely to result in findings of **jeopardy** or **adverse modification**. The Region submits such alerts as soon as the Services' have completed the necessary analysis to determine if a jeopardy biological opinion or conference opinion is warranted and consultation with the federal agency/applicant has been unsuccessful in avoiding the jeopardy determination. Additionally, Regional Directors are encouraged to advise the Director of potentially controversial consultations before an early alert is required.

Submit the early alert to the Chief, Division of Endangered Species. The Division of Endangered Species will prepare a cover memo and forward the early alert to the Assistant Director for Ecological Services, who will forward it to the Director. Allow 10 days in Washington to be sure the alert has been reviewed by the Director. Regional Directors must first send in an early alert to Washington and obtain approval from the Director before signing any draft and final biological opinions, preliminary biological opinions (early consultation), and conference opinions of regional or national significance likely to result in findings of jeopardy or adverse modification.

Use the following format:

**Exhibit 1-1. Format for an early alert**

**EARLY ALERT**

Prepared for: Director  
Date submitted:

State(s):

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**ISSUE:** Draft/Final [jeopardy/adverse modification] [opinion/conference] for the [name of the project]

**CONSULTING AGENCY/APPLICANT:**

**DATE CONSULTATION INITIATED:**

**DATE COMPLETION OF CONSULTATION IS DUE:**

**DATE OF ANY EXTENSIONS:** (explain reason for extension)

**PROJECT DESCRIPTION:** (provide a brief summary)

**EFFECT ON SPECIES/CRITICAL HABITAT:** (provide a brief summary of effect on [species/critical habitat])

**I. REASONABLE AND PRUDENT ALTERNATIVES:** (list)

**A. HAVE YOU COORDINATED WITH THE AGENCY/APPLICANT TO DEVELOP THE REASONABLE AND PRUDENT ALTERNATIVES?** (yes)  
(no) **EXPLAIN.**

**B. HAVE YOU COORDINATED WITH ALL AFFECTED TRIBAL GOVERNMENTS TO DEVELOP THE REASONABLE AND PRUDENT ALTERNATIVES PER SECRETARIAL ORDER #3206?**

(yes)

(no)**EXPLAIN.**

- C. IF NOT, HAVE THE PROPOSED REASONABLE AND PRUDENT ALTERNATIVES BEEN DISCUSSED WITH THE ACTION AGENCY/APPLICANT? WHAT WAS THEIR REACTION?**
- D. IS THE AGENCY/APPLICANT WILLING TO INCORPORATE THE REASONABLE AND PRUDENT ALTERNATIVES AND AMEND THEIR PROJECT DESCRIPTION TO AVOID A JEOPARDY/ADVERSE MODIFICATION OPINION? (yes) (no) EXPLAIN WHY/WHY NOT.**
- E. IF THERE ARE NO REASONABLE AND PRUDENT ALTERNATIVES, WHAT IS THE SCHEDULE FOR COORDINATING WITH THE AGENCY/APPLICANT TO DEVELOP THEM? EXPLAIN.**

**II. REASONABLE AND PRUDENT MEASURES: (list)**

- A. HAVE YOU COORDINATED WITH THE AGENCY/APPLICANT TO DEVELOP THE REASONABLE AND PRUDENT MEASURES? (yes) (no) EXPLAIN.**
- B. IF NOT, HAVE THE PROPOSED REASONABLE AND PRUDENT MEASURES BEEN DISCUSSED WITH THE ACTION AGENCY/APPLICANT? WHAT WAS THEIR REACTION?**
- C. IS THE AGENCY/APPLICANT WILLING TO IMPLEMENT THE REASONABLE AND PRUDENT MEASURES TO MINIMIZE THE IMPACTS OF INCIDENTAL TAKE? (yes) (no) EXPLAIN WHY/WHY NOT.**
- D. IF THERE ARE NO REASONABLE AND PRUDENT MEASURES, WHAT IS THE SCHEDULE FOR COORDINATING WITH THE AGENCY/APPLICANT TO DEVELOP THEM? EXPLAIN.**

**III. CONGRESSIONAL DISTRICTS AFFECTED:**

(list the Senators/Representatives and their Congressional district)

**IV. EXPECTED REACTION OF AGENCY/APPLICANT/OTHER INTERESTED PARTIES (tribes, States, NGOs):**

**REGIONAL OFFICE CONTACT:** (name, office, phone number)

## **National Marine Fisheries Service**

The NMFS Regions must provide the Chief of the Endangered Species Division and the Director, Office of Protected Resources, advance notice of any biological opinions that may result in a **jeopardy** or **adverse modification** conclusion and any biological opinion that is potentially controversial whether or not it results in a **jeopardy** or **adverse modification** conclusion.

### **(F) Release of Draft Documents**

Providing action agencies or applicants an opportunity to discuss a developing biological opinion, preliminary opinion, or conference may result in productive discussions that may reduce or eliminate adverse effects. If an action agency asks to review a draft opinion or a draft conference report or opinion, the Services should provide a draft. The section 7 regulations do not specify how an action agency should ask for this review. Generally, a telephone request from the equivalent of a field supervisor or higher official, documented in the administrative record, is sufficient.

Applicants can request draft opinion/conference documents through the action agency. When an action agency then requests this document for the applicant, the Services must inform the action agency that, once released to an applicant, the document may no longer be considered an interagency memorandum exempt from the disclosure requirements of the Freedom of Information Act (5 USC §552(b)(5)).

If an action agency or an applicant has comments on a draft opinion or conference document, the action agency must provide those comments to the Services in writing for the record. An applicant may copy the Services with the comments it provides to the action agency. The Services will consider an applicant's comments or concerns when they are officially transmitted by the action agency. [50 CFR §402.14(g)(5)]

### **(G) Maintaining the Administrative Record**

A good administrative record documenting and supporting a consultation and the resulting biological opinion is important, especially if a biological opinion is challenged or questions are raised concerning how or why certain conclusions were reached. At a minimum, administrative records for significant informal consultations, concurrences, conferences, and formal consultations should contain the following types of records as appropriate:

- o letters, memoranda, public notices, or other documents requesting the consultation;

- o summaries of meetings held, including dates, attendees, purpose, and results or conclusions;
- o summaries of field trips or site inspections, including dates, attendees, and photos of the site;
- o summaries of personal contacts between the biologist, the Federal agency, State or tribal biologists, applicant, consultant, private citizens or interest groups;
- o summaries of telephone conversations pertaining to the consultation, recorded on a standard telephone conversation record form;
- o written correspondence pertaining to the consultation, including correspondence from or to a prospective permit or license applicant;
- o electronic mail messages addressing meetings, field trips, personal contacts or correspondence referenced above that are pertinent to the decision-making process;
- o published material used in developing the consultation except bulky material, which can be referenced; and
- o other information used in the consultation process.

An example of the types of records that can be documented in an Administrative Record can be found in Appendix C.

## CHAPTER 2 - COORDINATION

### 2.1 COORDINATION WITH OTHER ENDANGERED SPECIES ACT FUNCTIONS

#### (A) Listing

Section 7 compliance may become necessary as soon as a species is proposed for listing or critical habitat is proposed for designation. Conferences are required if a proposed action is likely to jeopardize the continued existence of a proposed species, or adversely modify or destroy proposed critical habitat. Conferences generally base analyses of effects on the species status, distribution and threat data included in proposed listing rules and/or constituent elements described in proposed critical habitat rules. Other reliable data, such as published studies, species accounts, and peer-reviewed journal articles are also considered. Conferences conducted during the proposal period provide listing biologists with information to help refine the analysis of threats, and species or habitat data collected during these conferences. The final listing or critical habitat designation packages provide a primary data source for consultations until recovery plans and recovery-related research become available.

#### (B) Recovery Planning and Implementation

The 1988 amendments to the Act require comprehensive recovery plans that include "*a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species.*" This required segment of recovery plans should at a minimum, include the following:

- o numbers and distribution of recovery units;
- o basic life history of the species and its relationships to its supporting habitat;
- o natural and human-related factors affecting the species or its habitat, including elements of the species' critical habitat (e.g., requirements for cover; nutriment; effects of fire, flooding, and climatic features; symbionts, including pollinators; effects of predators, competitors, and other limiting factors such as the need for isolation from human-related activities or commensals), whose alteration can lead to the species' decreased capability for survival;



- o any distinction in species' behavior or required habitat needs if the species has a different core area or need for another life cycle period (breeding, nonbreeding, migrating or over wintering period); and
- o tolerance of the species or essential elements of its habitat to human activities (Exhibit 2-1).

Interrelationships exist between management actions outlined in recovery plans and the consultation process. It is important for the section 7 biologist to be familiar with species' recovery plans and to coordinate with the appropriate species recovery coordinator while ensuring any reasonable and prudent alternatives or any reasonable and prudent measures developed through the consultation process are consistent with recovery plan goals. Further, management actions identified in a recovery plan can be used as Terms and Conditions of an incidental take statement as long as they have the effect of minimizing the impact of incidental take from the project, and are limited to minor changes. If recovery plans identify specific habitats as essential for species' survival and recovery, close attention should be given to actions that may affect that habitat. It is generally appropriate to use management actions outlined in recovery plans as Conservation Recommendations.

## **Exhibit 2-1. Discussion of species' tolerance to disturbance (from the draft management plan for the Pawnee montane skipper)**

Populations in both the South and North Forks are needed to buffer against a single event or combination of events eliminating the butterfly from one of the areas. Only activities with negligible effects should be allowed without limit, and those with moderate effects should be kept at or below some reasonable upper limit. Activities with major effects should be avoided altogether. Activities of varying impact have been identified as follows:

1. Activities with no effect or slight effect:
  - (a) activities on the water or on the water's edge would have negligible effect on the skipper's habitat, including, but are not limited to, fishing, boating, piers, and boat docks; and (b) rights-of-way for power lines if less than 730 m, not treated with herbicides, and if maintained for host and nectar plants.
2. Activities with moderate effects:
  - (a) campgrounds not located in the densest subpopulation areas (1-4), not located in areas of major Liatris (principal food supply) density (150+ flowering stems/acre), and without large areas covered with parking lots, lawns, ball fields, or scraped areas. Campsites should be widely spaced and heavy foot traffic should be confined to designated paths; (b) narrow (1 lane with pullouts) paved or improved roads that avoid areas of major Liatris concentrations, road verges and adjacent berms and cuts should be managed to encourage growth of skipper nectar plants, and adjacent "brown-out" herbicided strips should be avoided; and (c) low density housing or commercial development that results in an aggregate of 5 percent or less of the suitable habitat of any subpopulations rendered unsuitable by roads, structures, lawns, plantings, parking lots, or associated activities.
3. Activities with major effects:
  - (a) any activity or combination of activities that eliminates more than 5 percent of any subpopulation's habitat areas; (b) any habitat-displacing activity located in an area of Liatris with 150 or more flowering stems/acre; and (c) any activity or development that creates large blocks of unsuitable habitat -- large paved parking lots, wide paved roads with broad graveled shoulders and adjacent herbiciding, wide power line rights-of-way treated with herbicides, subdivisions with large lawns, cultivated plots, or heavily grazed habitat.

## **(C) Section 10 Coordination**

### **Endangered and threatened species permits - section 10(a)(1)(A)**

Section 10 of the Act provides exceptions for activities otherwise prohibited by section 9. Section 10(a)(1)(A) authorizes the Services to issue permits for scientific purposes or to enhance the propagation or survival of listed species. The permitted activity must not operate to the disadvantage of the species and must be consistent with the purposes and policy set forth in section 2 of the Act. Formal intra-Service consultation is required for the issuance of FWS Regional blanket permits. Section 7 consultation (see Appendix E for the FWS intra-Service consultation handbook) must also be conducted prior to issuance of a section 10(a)(1)(A) permit or a subpermit under the Regional blanket permit. Section 10(a)(1)(A) permits are also required:

- o when a reasonable and prudent alternative calls for scientific research that will result in take of the species (this includes scientific research carried out by the Services);
- o when the agency, applicant or contractor plans to carry out additional research not required by an incidental take statement that would involve direct take (if this is part of the action and direct take is contemplated, a permit is not needed); and
- o for species surveys associated with biological assessments (usually developed during informal consultation) that result in take, including harassment.

### **Habitat conservation planning - section 10(a)(1)(B)**

Section 10(a)(1)(B) of the Act allows non-Federal parties planning activities that have no Federal nexus, but which could result in the incidental taking of listed animals, to apply for an incidental take permit. The application must include a habitat conservation plan (HCP) laying out the proposed actions, determining the effects of those actions on affected fish and wildlife species and their habitats (often including proposed or candidate species), and defining measures to minimize and mitigate adverse effects. The Services have developed a handbook for Habitat Conservation Planning and Incidental Take Permit Processing, which should be referenced for further information.

In some HCP planning areas, parties may strive to find a Federal nexus to avoid the HCP process altogether. These parties should be advised of the differences between incidental take capabilities under sections 7 and 10. Although the issuance of an incidental take permit under section 10 must not jeopardize the continued existence of a listed species, section 10

expressly authorizes the Services to minimize and mitigate, to the maximum extent practical, the adverse impacts to the species (supplying some benefit to the species such as land acquisition or habitat restoration or enhancement to offset unavoidable effects of the action). Mitigation may or may not reduce the actual number of individuals the Services' anticipate to be taken as a result of project implementation. For incidental take considerations under section 7, minimization of the level of take on the individuals affected is required. Also, the incidental take statement in a section 7 biological opinion does not provide a "No Surprises assurances" guarantee. The action agency is responsible for reinitiating consultation should their actions result in exceeding the level of incidental take.

Whenever practical, consideration should be given to programmatic or ecoregion consultation with Federal agencies having major programs in the HCP areas to facilitate overall consultation and recovery actions for the species involved (see section 5.3).

#### **Experimental populations - section 10(j)**

Section 10(j) of the Act authorizes listed species to be released as experimental populations outside their currently occupied range, but within probable historic habitat, to further species conservation. Before making a release, the Services determine by rulemaking whether that population is "essential" or "nonessential." An "essential experimental population" is a reintroduced population whose loss would be likely to appreciably reduce the likelihood of the survival of the species in the wild. A "nonessential experimental population" is a reintroduced population whose loss would not be likely to appreciably reduce the likelihood of survival of the species in the wild. For section 7 consultation purposes, section 10(j) requires the following:

- o any nonessential experimental population located outside a National Park or National Wildlife Refuge System unit is treated as a proposed species (conference may be conducted);
- o any nonessential experimental population located within a National Park System or National Wildlife Refuge System unit is treated as a threatened species (standard consultations are conducted);
- o any essential population is treated as a threatened species (standard consultations are conducted, and special rules may allow take);
- o critical habitat may be designated for essential experimental populations (standard consultations are conducted), but not for nonessential experimental populations; and

- o all populations of the species (including populations designated as experimental) are considered to be a single listed entity when making **jeopardy** determinations or other analyses in a section 7 consultation.

By definition, a "nonessential experimental population" is not essential to the continued existence of the species. Therefore no proposed action impacting a population so designated could lead to a **jeopardy** determination for the entire species.

A listed species that is reintroduced into its historic range without experimental population status receives full protection under the Act.

## **2.2 COORDINATION WITH THE ACTION AGENCY AND APPLICANT**

### **(A) Formal Consultations and Conferences**

The Act requires action agencies to consult or confer with the Services when there is discretionary Federal involvement or control over the action, whether apparent (issuance of a new Federal permit), or less direct (State operation of a program that retains Federal oversight, such as the National Pollution Discharge Elimination System Program). If there is an applicant for a permit or license related to the Federal action, the applicant may be involved in the consultation process (see section 2.2(E)).

Formal consultation becomes necessary when: (1) the action agency requests consultation after determining the proposed action may affect listed species or critical habitat [however, if the Service concurs in writing that the proposed action is not likely to adversely affect any listed species or critical habitat (i.e., the effects are completely beneficial, insignificant, or discountable), then formal consultation is not required]; or (2) the Services, through informal consultation, do not concur with the action agency's finding that the proposed action is not likely to adversely affect the listed species or critical habitat.

An action agency shall confer with the Services if the action is likely to jeopardize the continued existence of a proposed species or result in the destruction or **adverse modification** of proposed critical habitat. The conference process helps determine the likely effect of the proposed action and any alternatives to avoid **jeopardy** to a proposed species or destruction or **adverse modification** of proposed critical habitat.

When two or more Federal agencies are involved in an activity affecting listed species or critical habitat, one agency is designated as the lead (50 CFR §402.07), often based on which

agency has the principal responsibility for the project (e.g., a dam is maintained to provide a pool for generating electricity - a Federal Energy Regulatory Commission (FERC) responsibility, but the capacity behind the dam also provides flood storage - a Corps responsibility. In this case, FERC has lead for the consultation as the dam would probably not be there except for the power generation need). Although one agency has the lead, the other still has to provide data for effects analyses and development of reasonable and prudent alternatives and measures if its activities may affect listed species or critical habitat.

## **(B) Commitment of Resources during Consultation**

*"(d) After initiation of consultation required under subsection (a)(2), the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2)."*

Section 7(d) of the Endangered Species Act

Section 7(d) was added to the Act in 1978 as part of the package that created the exemption process. Congress intended this provision to avoid future Tellico Dam scenarios by forbidding certain irreversible and irretrievable resource commitments during consultation, thus keeping open all opportunities to develop reasonable and prudent alternatives.

Not all irreversible and irretrievable commitments of resources are prohibited. The formulation or implementation of any reasonable and prudent alternative must be foreclosed by the resource commitment to violate section 7(d). Thus, resource commitments may occur as long as the action agency retains sufficient discretion and flexibility to modify its action to allow formulation and implementation of an appropriate reasonable and prudent alternative. Destroying potential alternative habitat within the project area, for example, could violate section 7(d).

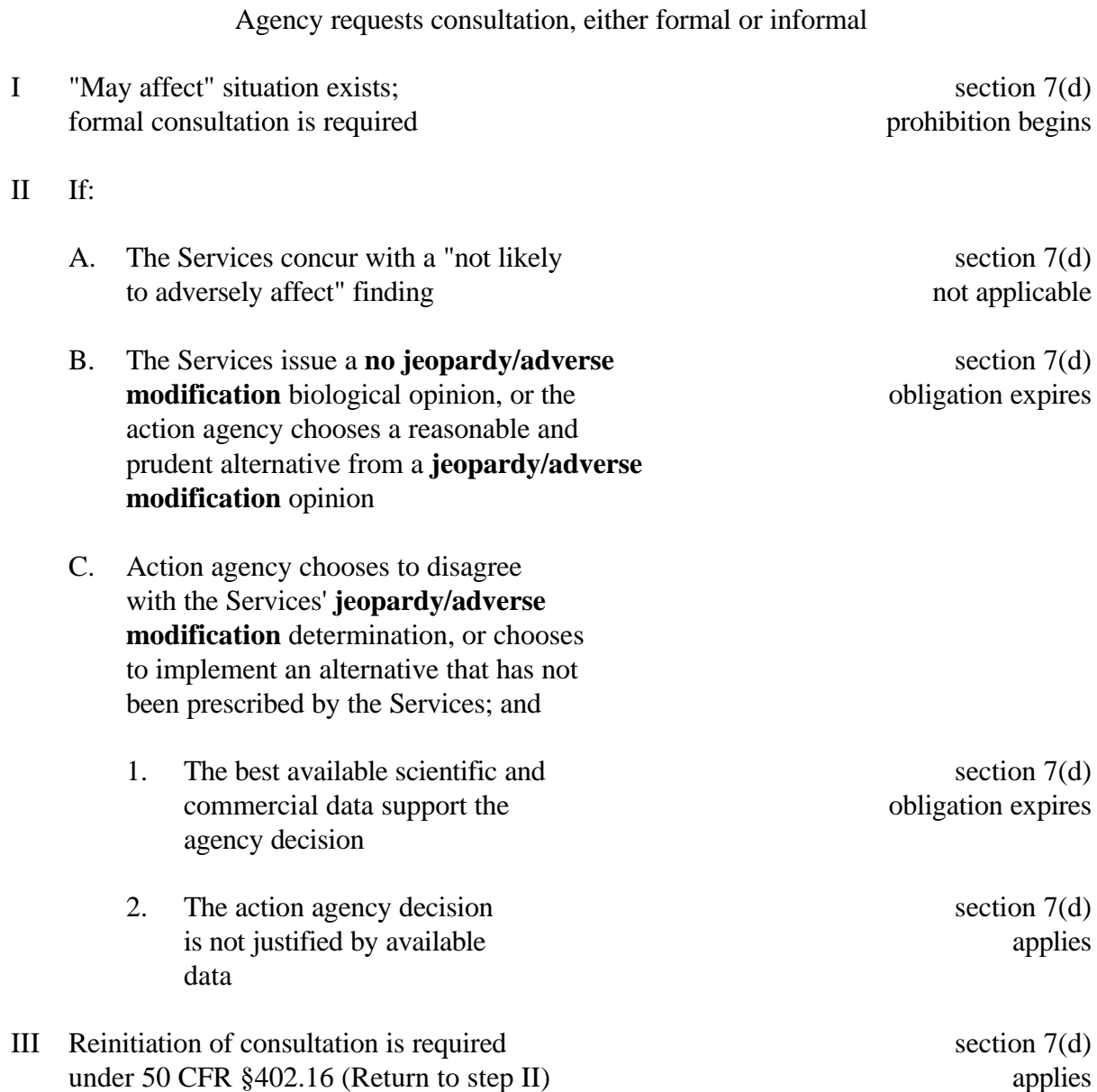
This section 7(d) restriction remains in effect from the determination of "may affect" until the action agency advises the Services which reasonable and prudent alternative will be implemented if the biological opinion finds **jeopardy** or **adverse modification** (Figure 2-1). Failure to observe this provision can disqualify the agency or applicant from seeking an exemption under section 7.

The action agency may choose not to implement the Services' reasonable and prudent alternative; instead, the action agency can choose to develop an alternative based on what they perceive as the best available scientific and commercial data. It is the responsibility of the

action agency, not the Services, to determine the validity of the action agency's alternative. If the agency's alternative is challenged in court, the standard for review will be whether the decision was arbitrary and capricious under the Administrative Procedures Act. The validity of the action agency's decision will determine whether section 7(a)(2) has been satisfied and whether section 7(d) is applicable. If it is determined that the action agency's decision is not valid, that agency would be taking the risk of noncompliance with the Act (51 FR 19940 (June 3, 1986)).

The Services do not provide an opinion on the question of resource commitments. Under the exemption process, that question is ultimately referred to the Endangered Species Committee for resolution. However, the Services will notify Federal agencies of the section 7(d) prohibition when formal consultation is initiated. Similarly, under section 7(c), biological assessments must be completed for "major construction activities" before any contracts are entered into or construction is begun.

**Figure 2-1. Application of section 7(d): irreversible or irretrievable commitment of resources**





## **(C) Dealing with Nonresponsive Agencies**

### **Agencies that refuse to consult or confer**

When an action agency disagrees or does not respond to the Services' informal suggestions for consultation or conference, the Services should send a letter requesting the agency to initiate such action. The letter notifies the agency of its responsibilities under the Act, and presents a clear case for the Services' determination of "may affect" for listed species or "likely to **jeopardize**" for proposed species. Possible **adverse modification** of designated or proposed critical habitat is treated similarly. If the agency still refuses to consult, the issue should be elevated to the Regional Office of either the FWS or the NMFS, depending upon the species involved. For the FWS, the elevation would be to the appropriate Regional Director. For the NMFS, the elevation would be to either the appropriate Regional Director, or the Director - Office of Protected Resources at the headquarters office.

The Regional Director can pursue the need to consult with the action agency. The Services cannot force an action agency to consult. However, if the proposed action results in take of a listed fish or wildlife species, the matter should be referred to either the FWS Law Enforcement Division and the Office of the Solicitor, or the NMFS Office of Law Enforcement and the Office of General Counsel - depending upon which species are involved. Additionally, if the action agency requests consultation after-the-fact, that consultation cannot eliminate any section 9 liability for take that has occurred already (Appendix D, Solicitor's opinion #SO-5).

Generally, the Services do not provide an opinion or conference report until the agency has identified a "may affect" situation; such an opinion or report could be challenged as incomplete where no consultation (discussion) with the agency took place. However, in some cases the Services and the action agency may have an agreement allowing consultations to be conducted without the agency determining that there is a may affect situation.

### **Agencies that refuse to reinitiate consultation**

When consultation needs to be reinitiated but the action agency neither agrees nor responds, the Services should send a letter clearly outlining the change of circumstances supporting the need for reinitiation. The letter notifies the agency of its responsibilities under the Act, and presents a clear case for why the Services' have determined that one or more of the four general conditions for reinitiating consultation have been triggered (50 CFR 402.16). If the agency still refuses to consult, the issue should be elevated to the Regional Office of either the FWS or the NMFS, depending upon the species involved. For the FWS, the elevation would

be to the appropriate Regional Director. For NMFS, the elevation would be to either the appropriate Regional Administrator, or the Director - Office of Protected Resources at the headquarters office. They can pursue the need to reinitiate consultation with the action agency.

Although the Services' can not require Federal agencies to reinitiate consultation if they choose not to do so, any unauthorized "take" should be referred to either the FWS Law Enforcement Division and the Office of the Solicitor, or the NMFS Office of Law Enforcement and the Office of General Counsel - depending upon which species are involved.

#### **(D) Compliance with Section 7(a)(2)**

The action agency determines whether and how to proceed with its proposed action in light of the Services' biological opinion, even though the terms and conditions of incidental take statements are non-discretionary. Nevertheless, the Services' biological opinion is traditionally afforded substantial deference by any reviewing court, and action agencies must give great weight to the Services' biological opinion before deciding on a proposed action. Failure to explain in the administrative record how the agency addressed the Services' biological opinion could expose the action agency to a judicial challenge under both the Act and the Administrative Procedure Act.

#### **No jeopardy and/or no adverse modification finding**

The action agency may proceed with the action as proposed, provided no incidental take is anticipated. If incidental take is anticipated, the agency or the applicant must comply with the reasonable and prudent measures and implementing terms and conditions in the Services' incidental take statement to avoid potential liability for any incidental take.

#### **Jeopardy/adverse modification finding**

If a **jeopardy** or **adverse modification** determination results from the consultation, the action agency may:

- o adopt one of the reasonable and prudent alternatives for eliminating the **jeopardy** or **adverse modification** of critical habitat in the opinion;
- o decide not to grant the permit, fund the project, or undertake the action;
- o request an exemption from the Endangered Species Committee (see Appendix G);

- o reinstitute the consultation by proposing modification of the action or offering reasonable and prudent alternatives not yet considered; or
- o choose to take other action if it believes, after a review of the biological opinion and the best available scientific information, such action satisfies section 7(a)(2).

The action agency must notify the Services of its final decision on any proposed action that receives a **jeopardy** or **adverse modification** biological opinion (50 CFR §402.15(b)).

### **Incidental take statements**

Violation of the section 9 taking prohibition results in liability unless the terms and conditions of the incidental take statement are followed. The agency must undertake the required actions to minimize incidental take, or require these actions as conditions of the permit or grant. The agency has a continuing duty to regulate the activity covered by the incidental take permit; otherwise the protective coverage of section 7(o)(2) may lapse.

## **(E) Role of the Permit or License Applicant**

### **Identification of an applicant**

The Services do not determine formally whether or who is an applicant for a Federal agency action, although the regulations and their preamble provide guidance. For purposes of this discussion, the Federal action involves the approval of a permit or license sought by the applicant, together with the activities resulting from such permission. The action agency determines applicant status, including requests arising from prospective applicants in early consultations. The action agency also determines how the applicants are to be involved in the consultation, consistent with provisions of section 7(a)(3), (b) and (c) of the Act and the section 7 regulations.

Users of public resources (e.g. timber companies harvesting on National Forests) are not parties to programmatic section 7 consultations dealing with an agency's overall management operations, including land management planning and other program level consultations. However, users who are party to a discrete action (i.e., where they are already the successful bidder on a timber sale that becomes the subject of later consultation or reinitiation when a new species is listed or new critical habitat is designated) may participate as applicants in the section 7 process.

If an agency supports an "applicant" who does not meet the criteria described above, the Services nonetheless should try to work with that party, although the procedural opportunities afforded to applicants will not apply to that party.

### **Applicant's role in the consultation process**

If the Federal agency identifies an applicant, the Services and the action agency meet their obligations to that party as outlined in 50 CFR§402 through the following:

- o the action agency provides the applicant an opportunity to submit information for consideration during the consultation;
- o the applicant must be informed by the action agency of the estimated length of any extension of the 180-day timeframe for preparing a biological assessment, along with a written statement of the reasons for the extension;
- o the timeframes for concluding formal consultation cannot be extended beyond 60 days without the applicant's concurrence;
- o the applicant is entitled to review draft biological opinions obtained through the action agency, and to provide comments through the action agency;
- o the Services will discuss the basis of their biological determination with the applicant and seek the applicant's expertise in identifying reasonable and prudent alternatives to the action if likely **jeopardy** or **adverse modification** of critical habitat is determined; and
- o the Services provide the applicant with a copy of the final biological opinion.

The Services do not work directly with or take comments directly from the applicant without the knowledge or consent of the action agency [50 CFR 402.14(g)(5)].

### **(F) Role of the Non-Federal Representative**

Non-Federal representatives may be involved in the informal consultation process and may request and receive species lists, prepare the biological assessment, and provide information

for the formal consultation. However, the Services require the action agency to designate formally the non-Federal representative in writing. Moreover, the action agency must be informed that the ultimate responsibility for section 7 obligations remains with the action agency.

## **2.3 COORDINATION BETWEEN FWS AND NMFS**

The NMFS and the FWS are individually responsible for consultation on listed species under each of their respective jurisdictions. However, the FWS and NMFS also have joint jurisdiction over some listed species. Consultation on these shared listed species requires a joint effort between the FWS and the NMFS. Use of this joint handbook will help to ensure that FWS and NMFS will approach section 7 consultation in a consistent manner. Increasingly, consultations on listed species administered by FWS overlap with those administered by the NMFS and vice versa. In these instances, the FWS should strive to coordinate informal and formal consultations with their NMFS counterparts and vice versa. Also, when formal consultations may affect species under NMFS jurisdiction, the FWS needs to remind the action agency, through early correspondence and/or as a footnote to the formal consultation package, of the need to consult with NMFS and vice versa.

Coordination between FWS and NMFS is critical to ensure any reasonable and prudent alternatives prescribed by both the Services (e.g., the conservation of sea turtles) are compatible. The terms and conditions of incidental take statements must be compatible so the action agency can implement both opinions without further consultation.

Currently, NMFS listed species that may require joint coordination include several whales, the Hawaiian monk seal, several runs of salmon in the Northwest and California, the shortnose sturgeon, and sea turtles while in the water. Recent joint FWS/NMFS consultations have included actions on the Gulf sturgeon in the Gulf of Mexico, Corps of Engineers dredging impacts to sea turtles in Florida, programmatic consultations on salmon and owls in the Pacific Northwest, and oil exploration in Alaska.

## **2.4 COORDINATION WITH OTHER FEDERAL AGENCIES**

Consultations with other Federal agencies follow 50 CFR §402 unless counterpart regulations (explained in 50 CFR §402.04) are approved for that agency. Although no counterpart

regulations have been issued to date, field stations may consider entering into optional procedures that provide better working relationships with other agencies at a local level consistent with 50 CFR §402. Other agencies may wish to consult on all or a subset of their activities on a local or regional programmatic basis.

Examples of specific agency programs and their relationship to section 7 follow:

Bureau of Indian Affairs (BIA): All actions funded, permitted, or undertaken by BIA for the benefit of Indian tribes or other tribal entities will involve BIA when Federal agency decisions or other actions are required. The affected tribe/entity shall be treated as the designated non-Federal representative or applicant, entitled to full participation in the consultation process, but does not have standing as a Federal agency for consultation purposes.

Office of Hearings and Appeals (OHA): A January 8, 1993, memorandum (Appendix D, #S-1) from the Secretary of the Interior clarified that OHA has no authority to review the merits of the Services' biological opinions. That review is limited to the Federal courts.

Corps of Engineers (Corps), Bureau of Reclamation (Reclamation), Federal Energy Regulatory Commission (FERC): Ongoing operations, relicensing and reauthorizations for water projects that predate the Act are subject to consultation if the agency retains any discretion in continuing project operations. Development of new water or power production projects funded with Federal monies will require section 7 consultation.

Environmental Protection Agency (EPA): Programs delegated to States for operation are subject to consultation pursuant to 50 CFR 402 and supplemental guidance provided in existing MOAs tailored to program-specific needs. The Services are working with EPA to develop a MOA specific to section 7 consultations for programs which have been delegated to the States under the Clean Water Act. Before entering into consultation with the EPA, check on whether the MOA has been signed. Once signed, the MOA will be considered an addendum to this handbook.

Federal Emergency Management Agency (FEMA): All of FEMA's actions are subject to the Act, although the nature of many of their programs may call for greater use of the emergency consultation process. Improving the Services' working relationships with FEMA counterparts can help develop appropriate responses to categories of emergencies before a crisis occurs.

Housing and Urban Development (HUD): Most parties seeking HUD grants have completed project planning before applying for the grant. Knowing early on about developments being considered in a species' range can help with project direction. If HUD monies are likely to be

sought, the applicant can be encouraged to use the early consultation process. If there is no Federal nexus, a section 10(a)(1)(B) permit may be appropriate.

Natural Resource Conservation Service (NRCS) (formerly the Soil Conservation Service): implements Federal mandates to maintain and enhance natural resources through local or regional sponsors. These sponsors may be designated as non-Federal representatives by written documentation from NRCS.

## **2.5 COORDINATION WITH STATE AGENCIES**

The term State agency means any State agency, department, board, commission, or other governmental entity that is responsible for the management and conservation of fish, plant, or wildlife resources within a State. (ESA § 3(17))

The Services' policy regarding the role of State agencies in activities under the Act [59 FR 34274-34275 (July 1, 1994)] (see copy in Appendix A), calls for cooperation with States as follows:

As part of the consultation program, it is the policy of the Services to:

- o inform State agencies of any Federal agency action that is likely to adversely affect listed or proposed species or designated or proposed critical habitat, and request relevant information from them, including the results of any related studies, in analyzing the effects of the action and cumulative effects on the species and habitat.
- o request an information update from State agencies prior to preparing the final biological opinion to ensure that the findings and recommendations are based on the best scientific and commercial data available.
- o recommend to Federal agencies that they provide State agencies with copies of the final biological opinion unless the information related to the consultation is protected by national security classification or is confidential business information. Decisions to release such classified or confidential business information shall follow the action agency's procedures. Biological opinions not containing such classified or confidential business information will be provided to the State agencies by the Services, if not provided by the action agency, after 10 working days. The exception to this waiting period allows simultaneous provision of copies when there is a joint Federal-State consultation action.

## **2.6 COORDINATION WITH TRIBAL GOVERNMENTS**

The unique and distinctive political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements, and differentiates tribes from other entities that deal with, or are affected by, the Federal government. This relationship has given rise to a special Federal trust responsibility, involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

On June 28, 1994, the FWS issued its Native American policy entitled "The Native American Policy of the U.S. Fish and Wildlife Service." On March 30, 1995, the Department of Commerce issued its tribal policy entitled "American Indian and Alaska Native Policy of the Department of Commerce." On June 5, 1997, the Departments of Interior and Commerce (Departments) signed joint Secretarial Order #3206 entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act" as a further refinement of these Native American policies to foster partnerships with tribal governments in activities under the Act.

Under this Secretarial Order, the Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Congressional and Administrative policies promote tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The Departments recognize and respect, and shall consider, the value that tribal traditional knowledge provides to tribal and federal land management decision making and tribal resource management activities.

The Departments recognize that Indian tribes are governmental sovereigns. Inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources. The Departments



shall be sensitive to the fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.

Because of the unique government-to-government relationship between Indian tribes and the United States, the Departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems.

In facilitating a government-to-government relationship, the Departments may work with intertribal organizations, to the extent such organizations are authorized by their member tribes to carry out resource management responsibilities.

This Secretarial Order clarifies the responsibilities of the component agencies, bureaus and offices of the Departments when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights. This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes.

Accordingly, the Departments will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.

Under the Secretarial Order, tribal governments can play a role in the consultation process when agency actions may affect tribal trust resources or tribal rights. The Services shall coordinate with affected Indian tribes in order to fulfill the Services' trust responsibilities, shall encourage meaningful tribal participation in the section 7 consultation process and shall:

- o Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected Indian tribes in addition to data provided by the action agency during the consultation process. The Services shall provide timely notification to affected tribes as soon as the Services are aware that a proposed federal agency action subject to formal consultation may affect tribal rights or tribal trust resources.

- o Provide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.
- o When the Services enter formal consultation on an action proposed by the Bureau of Indian Affairs (BIA), the Services shall consider and treat affected tribes as license or permit applicants entitled to full participation in the consultation process. This shall include, but is not limited to, invitation to meetings between the Services and BIA, opportunities to provide pertinent scientific data and to review data in the administrative record, and to review biological assessments and draft biological opinions. In keeping with the trust responsibility, tribal conservation and management plans for tribal trust resources that govern activities on Indian lands, including for purposes of this paragraph, tribally-owned fee lands, shall serve as the basis for developing any reasonable and prudent alternatives, to the extent practicable.
- o When the Services enter into formal consultations with an Interior Department agency other than the BIA, or an agency of the Department of Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and provide for the participation of the BIA in the consultation process.
- o When the Services enter into formal consultations with agencies not in the Departments of the Interior or Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and encourage the action agency to invite the affected tribe(s) and the BIA to participate in the consultation process.
- o In developing reasonable and prudent alternatives, the Services shall give full consideration to all comments and information received from any affected tribe, and shall strive to ensure that any alternative selected does not discriminate against such tribe(s). The Services shall make a written determination describing (i) how the selected alternative is consistent with their trust responsibilities, and (ii) the extent to which tribal conservation and management plans for affected tribal trust resources can be incorporated into any such alternative.
- o When FWS or NMFS actions may affect the reserved lands or the exercise of reserved rights of tribal governments, the Services will cooperate with affected tribal governments to encourage and facilitate tribal participation in the consultation process. Where the Services are aware of a proposed Federal agency action that

may affect the reserved lands or the exercise of reserved rights under the jurisdiction of tribal governments, the Services will strongly recommend to the Federal action agency that they work with and encourage affected tribal governments to participate in the consultation process.

## **CHAPTER 3 - INFORMAL CONSULTATION**

### **3.1 THE INFORMAL CONSULTATION PROCESS**

Most consultations are conducted informally with the Federal agency or a designated non-Federal representative. Informal consultations:

- o clarify whether and what listed, proposed, and candidate species or designated or proposed critical habitats may be in the action area;
- o determine what effect the action may have on these species or critical habitats;
- o explore ways to modify the action to reduce or remove adverse effects to the species or critical habitats;
- o determine the need to enter into formal consultation for listed species or designated critical habitats, or conference for proposed species or proposed critical habitats; and
- o explore the design or modification of an action to benefit the species.

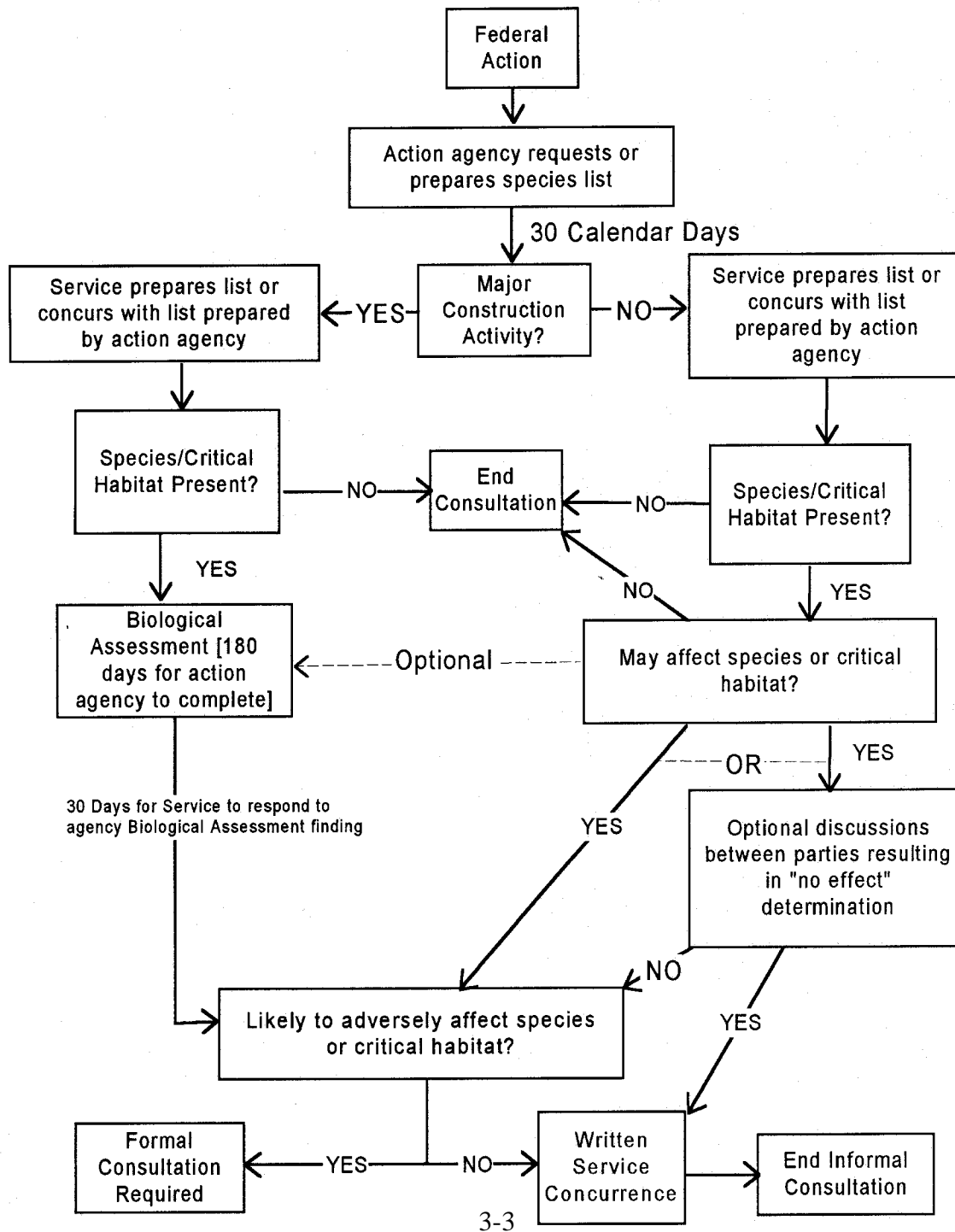
When used in the context of consultation, the term "informal" suggests an unstructured approach to meeting section 7 requirements. Such consultation includes phone contacts, meetings, conversations, letters, project modifications and concurrences that occur prior to (1) initiation of formal consultation or (2) the Services' concurrence that formal consultation is not necessary. Participation in informal consultation may include (1) the action agency, (2) a designated non-Federal representative, (3) an applicant or permittee, or (4) consultants working on behalf of any of the first three. The informal consultation process may uncover data gaps which may complicate the section 7 analysis. In such situations, additional studies may be necessary to document the species' status in the action area to improve the data base upon which a biological assessment or, if formal consultation is warranted, a biological opinion is developed.

While there is no overall timetable for informal discussions, timeframes are established for some individual elements of informal consultation (Figure 3-1). The biological assessment, including the effects of the action, must be submitted within 180 calendar days of receipt of a species list from the Services. The current accuracy of the species list needs to be verified if it is more than 90 days old and preparation of the biological assessment has yet to begin [50

CFR §402.12(e)]. Dialogue can continue as long as both parties are willing to participate and are actively working to complete the informal consultation. Although not required by section 7, many agencies request species lists, or concurrence with submitted species lists, for projects that are not "major construction activities." Although a timeframe for responding to these requests is not mandated by regulation, the Services will respond within 30 calendar days when possible. See Exhibit 3-1 for an example of a species list.

Documentation of the steps in the informal consultation process is essential to its continued utility and success. The administrative file should contain records of phone contacts, including name of the caller, the purpose of the call as it relates to the proposed action or action area, and any advice or recommendations provided by the Services' biologist. A meeting can be easily documented by letter to appropriate parties that summarizes the meeting results, particularly any Services' concerns and recommendations.

**Figure 3-1. Informal consultation process**



### Exhibit 3-1. Example of a species list

United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services  
C/o CCSU, Campus Box 338  
6300 Ocean Drive  
Corpus Christi, Texas 78412

(date)

Consultation No: x-xx-xx-x-xxx

Dear \_\_\_\_\_:

This responds to your letter dated \_\_\_\_\_, regarding the effects of the proposed replacement of sections of pipe on species Federally listed, proposed for Federal listing, and candidate species occurring in Goliad County, Texas. In addition your project was evaluated with respect to wetlands and other important fish and wildlife habitat.

It is our understanding that the proposed project would involve the replacement of five (5) sections of 6" pipe totaling 119 feet. Associated construction activities would be within the existing right-of-way located in the Cabeza Creek Field. This project is intended to maintain efficient operations of United's pipeline system.

Our data indicates that the following species and critical habitat may occur in the project area.

(1) Listed species

Attwater's prairie chicken (Tympanuchus cupido attwateri) - E  
bald eagle (Haliaeetus leucocephalus)- E

(2) Proposed species

(give common name, scientific name, and status - PE or PT)

(3) Candidate species

(give common name and scientific name of species)

(4) Designated critical habitat for  
(give common name and scientific name of species)

(5) Proposed critical habitat for  
(give common name and scientific name of species)

Our data indicate that Federally listed species, proposed species, candidate species, and designated and proposed critical habitat are not likely to be impacted by the proposed project action. With respect to wetlands and other important fish and wildlife habitat, it appears that the proposed action will not significantly impact these resources. If project plans change or portions of the proposed project were not evaluated, it is our recommendation that the changes be submitted for our review. If you require additional information, please contact \_\_\_\_\_(name)\_\_\_\_\_ of this office at \_\_\_\_\_(phone)\_\_\_\_\_.

Sincerely yours,

Field Supervisor



### **3.2 IDENTIFICATION, RESOLUTION, AND CONSERVATION**

Except in those cases where the need for formal consultation is clear from the start, the Services will encourage all action agencies entering into the consultation process to start with informal consultation rather than formal consultation. This will allow for early consideration of listed species concerns, similar to the early scoping process of NEPA. Many consultations can and should be handled informally. This gives the Services an opportunity to be involved early and to resolve problems as they are identified.

Informal consultation determines the likelihood of adverse effects on a listed species or critical habitat. Informal consultations (1) identify adverse effects and suggest ways to avoid them, (2) resolve project conflicts or differences of opinion between the Services and the action agency or applicant as to the nature and extent of adverse effects, (3) provide the action agency with opportunities for carrying out conservation activities pursuant to section 7(a)(1), and (4) help monitor cumulative effects on a species or ecosystem.

Service biologists must be well informed about species' status, distribution, threats, and recovery objectives to carry out the informal consultation process effectively. All decisions reached during the consultation process must be based on sound science. The logical place to start data gathering is the field station's species files. Other reliable sources are State and tribal fish and wildlife agencies, Federal land management agencies, State Natural Heritage Programs, species experts, cooperative research units, recovery teams, The Nature Conservancy, and private consultants. All may provide or verify information, and should be used as needed.

Conflict resolutions during informal consultation may involve changes in construction scheduling, engineering design, pesticide formulation or application method, location, emission or discharge levels and many other changes. All possible options to eliminate adverse effects should be discussed freely with the action agency, and they should be encouraged to recommend their own options. The Services do not offer "not likely to adversely affect" concurrences unless the project's dimensions are defined clearly at the informal stage. Finally, informal consultation offers action agencies an opportunity to address their conservation responsibilities under section 7(a)(1). Recovery plans often identify tasks benefiting listed species that may be carried out on or near the project site. Examples include habitat protection, modification or improvement; predator control; and survey work.

### **3.3 TECHNICAL ASSISTANCE**

A telephoned or written inquiry about the presence or absence of listed and/or proposed species in a project area usually initiates informal consultation. Service biologists may respond in several ways. If species are not likely to be present, the consultation requirement is met, and the Services may advise the agency, applicant or consultant of this in writing. If historical records or habitat similarities suggest the species may be in the area, then some survey work may be recommended to make a more precise determination. If the species is definitely in the project area, but the Services determine it will not be adversely affected, the Services may notify the agency of that finding (e.g., bald eagles fly over but do not feed, roost, or nest in the area, and are not expected to be adversely affected).

Technical assistance from the Services may take a variety of forms; it includes the species list provided by the Service, information on listed, proposed, and candidate species, as well as names of contacts having information on other sensitive species or State listed species. The Services may alert State or tribal agencies, or other Services offices of the project. See Exhibit 3-2 for a letter on the need for a survey.

The Services may recommend that the action agency conduct additional studies on species' distribution in the area affected by the action. Normally, Services biologists only request additional survey work, but sometimes monitoring impacts of the action on aspects of the species' life cycle may be agreed upon during informal consultation. Monitoring may be recommended when incidental take is not anticipated but might possibly occur, thus triggering the need for formal consultation. In this situation, the action agency should be notified of the consequences of an unauthorized taking and be encouraged to enter formal consultation if take is anticipated. The action agency has no legal obligation to conduct or pay for these studies, but Service biologists should point out the advantages of doing them during informal consultation, particularly if the data gathered may preclude formal consultation. Also, Service biologists can remind action agencies of their responsibilities under section 7(a)(1) of the Act to aid in conservation of listed species.

While candidate species have no legal protection, Service biologists should notify agencies of candidate species in the action area, and may recommend ways to reduce adverse effects and/or request studies as appropriate. These may be added as conservation recommendations. Legally, the action agency does not have to implement such recommendations. However, candidate species may later be proposed for listing, making conference necessary in the future if proposed actions are likely to jeopardize the continued existence of such species. Service biologists should urge other Federal agencies to address candidate species in their Federal programs. The Services are eager to work with other Federal agencies to conserve candidate species. Addressing candidate species at this stage of consultation provides a focus on the overall health of the local ecosystem and may avert potential future conflicts.

Only technical assistance can be provided to agencies conducting actions outside the United States (e.g., in Canada), but knowledge of such actions should be considered in the "status of the species" analysis if consultations arise on impacts proposed to the species (e.g., whooping crane) in the U.S.

### **Exhibit 3-2. Example of a need for survey**

January 26, 1993

Dear \_\_\_\_\_ :

This responds to your letter dated December 28, 1992 requesting information on the presence of Federally listed and proposed endangered or threatened species in relation to the proposed Portland, Maine to Canada Natural Gas Pipeline for the Portland Natural Gas Transmission System.

Based on information currently available to us, the Federally listed endangered small whorled pogonia (Isotria medeoloides) is known to occur in several of the towns in southern Maine through which the proposed transmission lines may pass. The small whorled pogonia occurs both in fairly young forests and in maturing stands. Although varying in their composition, the mixed-deciduous or mixed deciduous/coniferous forests in which the small whorled pogonia grows are generally in second or third-growth successional stages. The ages of the older trees forming the canopy at some of the sites has been estimated to be about 75 years old in New Hampshire.

The soil in which the shallowly-rooted small whorled pogonia grows is usually covered with leaf litter. The substrate in which it is rooted may be a variety of different textures, from extremely stony glacial till, to stone-free sandy loams, to sterile duff. The common soil factor at most sites is the highly-acidic, nutrient-poor quality of the soil in which this orchid grows.

The majority of Isotria medeoloides sites generally share several common characteristics. These include only sparse to moderate ground cover in the microhabitat of the orchids (except when among ferns), a relatively open understory canopy, and nearness to logging roads, streams, or other features that create long persisting breaks in the forest canopy. For example, in New Hampshire, the small whorled pogonia has been found growing in and adjacent to recently abandoned, above ground telephone transmission lines.

Inasmuch as distributional information on many rare species is incomplete or imprecise, it is not currently possible to provide a definitive finding relative to small whorled pogonia in the permit area. Therefore, in situations such as this, where an endangered species is known to occur in similar habitats nearby, a qualified botanist should survey the following proposed alignments prior to construction activities: alignment sections with corresponding numbers 11 - 20 (no Figure identified) and Nos. 37 - 39 (Fig. 35). A survey for the small whorled pogonia

should be conducted by a botanist familiar with this species and should occur in July or August to ensure best survey conditions.

In addition for the potential of small whorled pogonia populations occurring within the project area, the candidate species, \_\_\_\_ (common and scientific name) \_\_\_\_ is known to occur at several locations near Portland. While candidate species are not afforded protection under the Endangered Species Act, the U.S. Fish and Wildlife Service encourages their consideration in environmental planning. If unnecessary impacts to candidate species can be avoided, the likelihood that they will require the protection of the Act in the future is reduced. We recommend that the alignment in the vicinity of Portland and Falmouth be surveyed for the \_\_\_\_ (common name of candidate species) \_\_\_\_.

One portion of the proposed alignment near Willoughby, Vermont (Figure 11) passes within five miles of a nest site of the Federally listed endangered peregrine falcon (Falco peregrinus anatum). However, based on the proposed project's distance from the nest (approximately 5 miles), we do not expect any impacts to occur to the resident peregrine falcons.

No other Federally listed or proposed threatened and endangered species under the jurisdiction of the U.S. Fish and Wildlife Service are known to occur in the project area, with the exception of occasional transient endangered bald eagles (Haliaeetus leucocephalus) or peregrine falcons.

For further information about or assistance with surveys for the small whorled pogonia or the \_\_\_\_ (common name of candidate species) \_\_\_\_, we suggest that you contact the Maine Natural Heritage Program, State House Station 130, Augusta, Maine 04333, 207-289-6800.

Please notify this office with the results of any surveys for the small whorled pogonia or the \_\_\_\_ (common name of candidate species) \_\_\_\_, so that we may determine whether there may be any impacts to these species. A list of Federally designated endangered and threatened species in Maine, New Hampshire and Vermont is included for your information. Thank you for your cooperation and please contact \_\_\_\_ (name) \_\_\_\_ of this office at \_\_\_\_ (phone) \_\_\_\_ for further coordination regarding this project.

Sincerely yours,

Field Supervisor

### 3.4 BIOLOGICAL ASSESSMENTS

*"(c)(1) To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall . . . request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).  
(2) Any person who may wish to apply for an exemption under subsection (g) of the section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency."*

#### Section 7(c) of the Endangered Species Act

By regulation, a biological assessment is prepared for "major construction activities" considered to be Federal actions significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.). A major construction activity is a construction project or other undertaking having similar physical impacts, which qualify under NEPA as a major federal action. Major construction activities include dams, buildings, pipelines, roads, water resource developments, channel improvements, and other such projects that modify the physical environment and that constitute major Federal actions. As a rule of thumb, if an Environmental Impact Statement is required for the proposed action and construction-type impacts are involved, it is considered a major construction activity.

A biological assessment is required if listed species or critical habitat may be present in the action area. It is optional if only proposed species or proposed critical habitat is involved.

However, if both proposed and listed species are present, a biological assessment is required and must address both proposed and listed species. An assessment also may be recommended for other activities to ensure the agency's early involvement and increase the chances for resolution during informal consultation.

If a biological assessment is required, formal consultation cannot be initiated until the biological assessment is completed. Some agencies submit an assessment early, benefitting from the informal consultation process; some need to be advised to do so. When Service biologists advise an action agency of the need for a biological assessment, the letter should indicate the importance of completing the assessment before letting contracts or beginning construction.

The Federal action agency may designate the applicant or a non-Federal representative (often a consultant) to prepare the biological assessment, although the action agency takes responsibility for the content of the assessment and for the findings of effect. The contents of the assessment are discretionary, but generally include results of on-site inspections determining the presence of listed or proposed species, and an analysis of the likely effects of the action on the species or habitat based on biological studies, review of the literature, and the views of species experts. The assessment also describes any known unrelated future non-Federal activities ("cumulative effects") reasonably certain to occur within the action area that are likely to affect the species. Sometimes information in other environmental analysis documents can substitute or be easily modified to produce the assessment.

The biological assessment should address all listed and proposed species found in the action area, not just those listed and proposed species that are likely to be affected. One of the purposes of the biological assessment is to help make the determination of whether the proposed action is "likely to adversely affect" listed species and critical habitat. To make such a determination, all species must be addressed. Such an assessment may help determine the need for conference as well as formal consultation. A biological assessment may be prepared (50 CFR §402.12(b)(1)) if the agency or the applicant may wish later to seek a permanent exemption from the Endangered Species Committee.

The agency is not required to prepare a biological assessment for actions that are not major construction activities, but, if a listed species or critical habitat is likely to be affected, the agency must provide the Services with an account of the basis for evaluating the likely effects of the action. The Services use this documentation along with any other available information to decide if concurrence with the agency's determination is warranted.

Sometimes, biological assessments are confused with environmental assessments. The contents of biological assessments prepared pursuant to the Act are largely at the discretion of the action agency although the regulations provide recommended contents (50 CFR §402.12(f)). Biological assessments are not required to analyze alternatives to proposed actions. Environmental assessments are prepared pursuant to the National Environmental Policy Act.

### 3.5 CONCURRENCE/NONCONCURRENCE LETTERS

Following review of the biological assessment or other pertinent information, another informal effort may be appropriate to try to eliminate any residual adverse effects. If that effort results in elimination of potential impacts, the Services will concur in writing that the action, as revised and newly described, is not likely to adversely affect listed species or designated critical habitat. Since concurrence depends upon implementation of the modifications, the concurrence letter must clearly state any modifications agreed to during informal consultation. If agreement cannot be reached, the agency is advised to initiate formal consultation.

Although not required, an action agency may request written concurrence from the Services that the proposed action will have no effect on listed species or critical habitat. This concurrence is useful for the administrative record. When the biological assessment or other information indicates that the action has no likelihood of adverse effect (including evaluation of effects that may be beneficial, insignificant, or discountable), the Services provide a letter of concurrence, which completes informal consultation. The analysis, based on review of all potential effects, direct and indirect, is documented in the concurrence letter. If the nature of the effects cannot be determined, benefit of the doubt is given to the species. Do not concur in this instance. After evaluating the potential for effect, one of the following determinations is made:

#### Listed species/designated critical habitat

- o **No effect** - the appropriate conclusion when the action agency determines its proposed action will not affect listed species or critical habitat (see Exhibit 3-3).
- o **Is not likely to adversely affect** - the appropriate conclusion when effects on listed species are expected to be discountable, or insignificant, or completely beneficial. **Beneficial effects** are contemporaneous positive effects without any adverse effects to the species. **Insignificant effects** relate to the size of the impact and should never reach the scale where take occurs. **Discountable effects** are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to



meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur (see Exhibits 3-4 and 3-5).

- o **Nonconcurrence** - if the Services do not agree with the action agency's determination of effects or if there is not enough information to adequately determine the nature of the effects, a letter of nonconcurrence is provided to the action agency (see Exhibit 3-6).
- o **Is likely to adversely affect** - the appropriate conclusion if any adverse effect to listed species may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions, and the effect is not: discountable, insignificant, or beneficial (see definition of "is not likely to adversely affect"). In the event the overall effect of the proposed action is beneficial to the listed species, but also is likely to cause some adverse effects, then the proposed action "is likely to adversely affect" the listed species. An "is likely to adversely affect" determination requires formal section 7 consultation.

#### **Proposed species/proposed critical habitat**

A fourth finding is possible for proposed species or proposed critical habitat:

- o **Is likely to jeopardize proposed species/adversely modify proposed critical habitat** - the appropriate conclusion when the action agency or the Services identify situations in which the proposed action is likely to jeopardize the continued existence of the proposed species or adversely modify the proposed critical habitat. If this conclusion is reached, conference is required.

**Exhibit 3-3. Example of a no effect response**

United States Department of the Interior

FISH AND WILDLIFE SERVICE

New England Field Offices

400 Ralph Pill Marketplace

22 Bridge Street, Unit #1

Concord, New Hampshire 03301-4901

RE: Nationwide Wetlands Permit

January 20, 1993

Drakes Island, Wells, Maine

Dear \_\_\_\_\_ :

We have reviewed your request for information about endangered and threatened species and their habitats for the above referenced project. The Federally listed threatened piping plover (Charadrius melodus) is known to occur on Laudholm Beach, near the proposed project. However, based on the project description and location, the Fish and Wildlife Service concurs with your determination that no impacts to Federally listed species will occur as a result of the proposed action. Should project plans change, or if additional information on the distribution of listed or proposed species becomes available, this determination may be reconsidered.

While it is not required for your Federal permit, we suggest that you contact the Maine Natural Heritage Program, State House Station 130, Augusta, Maine 04333, 207-289-6800 for information on state listed species that may be present.

A list of Federally designated endangered and threatened species in Maine is enclosed for your information. If you have further questions, please contact \_\_\_\_\_(name)\_\_\_\_\_ of this office at \_\_\_\_\_(phone)\_\_\_\_\_.

Sincerely yours,

Field Supervisor

#### **Exhibit 3-4. Example of a concurrence letter**

Re: Blanket clearance for minor construction projects

Dear \_\_\_\_\_ :

This responds to your request of November 18, 1992, for our concurrence with your approach to handling endangered species review of minor construction projects falling into the following categories specified in your letter:

1. Construction, abandonment, or relocation of points of delivery (PODs). We understand to establish a new POD, an existing pipeline is tapped at a point along a previously disturbed and maintained Right-Of-Way (ROW), and no more than 20 feet of small diameter pipe is installed. Limited aboveground facilities such as valves, separators, meters and small shelters may also be installed. To relocate or abandon a POD, an existing pipeline is cut and capped adjacent to the existing pipeline as previously described at a different location.
2. Construction and/or maintenance projects within existing, previously disturbed, and generally fenced compressor and measuring and regulatory (M&R) stations.
3. Construction and/or maintenance projects along existing, previously disturbed and maintained ROW. We understand from your letter that these minor projects are less than 100 feet in length and include projects for erosion and sedimentation control, cathodic protection installations and repairs to or replacement of facilities.

A Biological Assessment is required for "major construction activities" if listed species "may be present" in the action area - regardless of the likelihood or significance of the effects. However, since the above projects are not "major construction activities" and no listed species "may be present" in the action area, no Biological Assessment or further Section 7 Consultation pursuant to the Endangered Species Act of 1973 is required with the Fish and Wildlife Service for these particular activities. We concur that the types of activities described above will not adversely affect endangered or threatened species. Should additional information on listed or proposed species become available, this determination may be reconsidered.

The above comments are provided in accordance with the Endangered Species Act (87 Stat. 884, as amended; 16 U.S.C. 1531 et seq.). Our comments regarding compliance with the Fish and Wildlife Coordination Act (48 Stat. 401, as amended; 16 U.S.C. 661 et seq.), and the

Migratory Bird Treaty Act (40 Stat. 755, as amended; 16 U.S.C. 703 et seq.) were provided in our letter of February 11, 1992. Those comments remain valid.

We appreciate your conscientious efforts to comply with Federal requirements. If you have any questions regarding this letter, please contact \_\_\_\_ (name) \_\_\_\_ of this office at \_\_\_\_ (phone) \_\_\_\_.

Sincerely yours,

Field Supervisor

### **Exhibit 3-5. Example of a concurrence letter on a beneficial effect**

Dear \_\_\_\_\_ :

This letter responds to your Biological Assessment [or other title], received on [date], and your request for concurrence that all effects of the proposed [name and location of the action] on [name of listed species] will be beneficial.

The Fish and Wildlife Service [or National Marine Fisheries Service] (Service) has reviewed the submitted project description and evaluation of project effects, and concurs with your determination that all project effects on [name of listed species] will be beneficial.

[choose one of the following closings]

This concludes section 7 consultation on [name of action]. If you have any questions or concerns about this consultation or the consultation process in general, please feel free to contact me or [name of staff member] at [number].

[OR]

No further consultation on the effects of [project name] on [name of listed species] is required. However, since your BA [other title] also identified potential adverse effects from the project on [name of listed species], the formal consultation process will continue for those species that may be adversely affected. Section 7 allows the Service up to 90 calendar days to conclude formal consultation with your agency and an additional 45 calendar days to prepare our biological opinion (unless we mutually agree to an extension). Therefore, we expect to provide you with our biological opinion no later than [date = 135 calendar days after receipt of a complete initiation package].

As a reminder, the Endangered Species Act requires that after initiation of formal consultation, the Federal action agency may not make any irreversible or irretrievable commitment of resources that limits future options. This practice insures agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats.

If you have any questions or concerns about this consultation or the consultation process in general, please feel free to contact \_\_\_\_ (name) \_\_\_\_ of this office at \_\_\_\_ (phone) \_\_\_\_.

Sincerely yours,

Field Supervisor

**Exhibit 3-6. Example of a nonconcurrence letter**

United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Chesapeake Bay Field Office  
1825 Virginia Street  
Annapolis, Maryland 21401

January 11, 1993

Re: Endangered Species Act concerns relative to CENAB-OP-RP (CHESAPEAKE BEACH,  
TOWN OF)90-04126-1

Dear \_\_\_\_\_ :

We are writing to express our concerns regarding impacts of the referenced project on the Federally threatened Puritan tiger beetle (Cicindela puritana). Our comments are provided in accordance with Section 7 of the Endangered Species Act (87 stat. 884 as amended; 16 U.S.C. 1531 et seq.).

The project involves construction of a stone revetment and wooden walkway along the Chesapeake Bay at the Town of Chesapeake Beach a short distance north of a bayside cliff that supports a Puritan tiger beetle population. This population represents the northern limit of this beetle on the western shore of the Chesapeake Bay. In 1991, The Corps initiated informal consultation with the Service to determine whether the revetment/walkway project, due to its potential for increasing public access to tiger beetle habitat, might adversely affect the Puritan tiger beetle. As a result of the informal consultation process, it was agreed that the Town would construct and maintain a chain link fence at the northernmost limit of the cliffs supporting this threatened species. The fence was to be tied in to the cliff face and to extend 30 feet channelward of mean high water. The Service concurred that such a fence would decrease public access to the tiger beetle cliffs sufficiently to compensate for the increase in human use of the beach area, thus resulting in a net "no effect" to the beetles. The permit, issued May 14, 1991, was conditioned upon the construction and maintenance of this structure.

On December 15, 1992, we received information from your office indicating that the applicant had requested permission to re-locate the fence some 400 feet to the south of the originally proposed location. On January 7, 1993, the project location was inspected by \_\_\_\_\_(name)\_\_\_\_\_, endangered species biologist from our office, \_\_\_\_\_(name)\_\_\_\_ of your staff, and \_\_\_\_\_(name)\_\_\_\_\_ of the Maryland Natural Heritage Program. The fence had been constructed at the revised location, leaving a 400 foot section of cliff that is potential Puritan tiger beetle habitat on the public access side of the fence. Due to this change in the project, we can no longer concur with the "no effect" determination. In order to ensure compliance with the Endangered Species Act, we suggest one of the following courses of action be taken:

(a) The applicant should move the fence to the location specified in the existing permit. Compliance with this original permit condition would satisfy the previously established criterion for "no effect" and would conclude the consultation process for this project.

(b) Alternatively, the Corps should re-examine the project in its present form to determine whether it may affect any endangered or threatened species. If the possibility of an effect cannot be eliminated, the Corps is required to initiate formal consultation with the Service.

If you have any questions regarding this project, please contact \_\_\_\_\_(name)\_\_\_\_\_ of this office at \_\_\_\_\_(phone)\_\_\_\_\_. Thank you for your cooperation in the effort to protect endangered and threatened species.

Sincerely yours,

Field Supervisor